IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 393

EDGAR C. JOHNSTON,
Petitioner,

vs.

ARROW PETROLEUM CO., A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STEPHEN A. MITCHELL of
BISHOP, MITCHELL & BURDETT,
Board of Trade Bldg.,
Chicago, Illinois,
Attorney for Respondent.

ROBERT J. BURDETT,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

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STATEMENT OF THE CASE.

There can be no basis for any dispute of fact in this case, since the judgment below was entered on the pleadings, plus two stipulations of fact.

The petitioner is hereafter referred to as "Johnston" and the respondent "Arrow".

Arrow sued Johnston for his non-fulfillment of a contract entered into between them on September 6, 1941, providing for the sale and delivery by Johnston and purchase by Arrow of 187 odd thousand[1] barrels of fuel oil. The price was 85¢ a barrel plus 1.19 cents per gallon[2]

1. There had been an earlier contract between them for 225,000 barrels; this contract was for the portion remaining undelivered under the earlier contract (R. 3-6).

2. There are 42 gallons to the barrel of fuel oil.

to cover transportation by barge from Vicksburg to Lockport, Illinois, and deliveries were to be approximately 25,000 barrels per month.

The September 6, 1941 contract provided that Arrow was to have six hours hook-up time free, plus one hour to unload each 750 barrels of oil. For time beyond this Arrow was to pay the demurrage stipulated in the contract, except for delays caused by faulty equipment of the barges.

On March 30, 1942 Johnston had delivered only 76 odd thousand barrels. Arrow had paid promptly for this oil and also that under the former contract.[1] However, delays had arisen in unloading, as a consequence of which Johnston had billed Arrow for $4,433.66 for demurrage, $386.33 of which was for deliveries under the previous contract.

In its complaint, Arrow asserted that this claim was wholly unfounded because it was entitled to the hook-up time as to each barge in the tow, and Johnston allowed it only as to the tow as a whole, and because any further delays were caused by faulty equipment (R. 8). Johnston pleaded his interpretation of the hook-up time and denied that any delays were occasioned by faulty equipment (R. 20, 21).

On April 2, 1942 when Johnston had delivered only 76 odd thousand barrels, Arrow was pressing for further deliveries to meet its urgent commitments. Johnston then repudiated the contract because of Arrow's failure to pay demurrage. Arrow replied that it had never refused to pay demurrage justly owing, but Johnston insisted the contract was ended and demanded the $4,433.66.

Arrow sued here for the difference between the contract price and the market price of the oil remaining undelivered.

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1. This amounted to over $100,000.00 under the September 6, 1941, contract and to over $150,000.00 under both contracts.

Johnston moved to dismiss the complaint claiming it lacked legal sufficiency. In this he was unsuccessful. He then answered, attempting to justify his repudiation of the contract upon Arrow's refusal to pay demurrage and counter-claimed not only for the $4,433.66 of demurrage, but also for $25,000.00 special demurrage for Arrow's failure to unload the barges promptly.

He later[1] filed an amendment to this answer. The answer as amended, asserted an oral agreement by Arrow to unload the barges at 750 barrels an hour and to install equipment capable of doing so. It says these oral undertakings were of the essence of the contract, part of the consideration therefor and indivisible from the other undertakings of the written contract, but that Arrow persistently and in deliberate disregard breached them and, moreover, "categorically refused to pay any demurrage whatsoever". It then says that such conduct by Arrow showed a deliberate intent to repudiate material undertakings, showing a wilful default, going to the root of the contract.

Arrow's motions testing the legal sufficiency of the answer and the special damages in the counterclaim were sustained (R. 95, 96), leaving only two questions: the amount due for demurrage, if any, and the damages due Arrow, if any. These figures were resolved by stipulation upon the entry of the judgment order. Arrow had judgment for the difference (R. 180, 181).[2] This was affirmed by the Circuit Court of Appeals.

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1. This was almost two years after the original answer was filed, and after Arrow's brief on the motion testing the legal sufficiency of the original answer was filed (R. 17, 42, 32, 40, 41).

2. The Third Defense, filed more than three years after suit was brought, and after disposition of the motions attacking the answer and counterclaim are ignored here, since Johnston states he is not raising them on his petition. Its lack of merit is clearly covered by the Court of Appeals decision and the decision of the trial Court (R. 78-81).

The Sole Issue Presented Here.

There were three issues before the Circuit Court of Appeals: (a) The trial Court's ruling on the sufficiency of the Complaint; (b) the trial Court's ruling in sustaining the motion testing the legal sufficiency of the Answer as amended and the Counterclaim; and (c) the ruling on the Third Defense.

The only one of these rulings complained of here is that on the legal sufficiency of the answer, as amended. The trial Court held that it was insufficient as a defense, and this was affirmed upon appeal.

The basis of these rulings was that the oral agreements pleaded by Johnston were unavailable to vary or enlarge the provisions of the written contract, that the intent of the parties was to be derived from the terms of the written contract; and that Arrow's failure to pay the demurrage did not justify Johnston in repudiating the written contract, since the covenant to pay demurrage was independent and incidental to its main purpose, and its breach did not result in the defeat of the contract nor render its object unattainable.

Johnston's position here is that the Court of Appeals decided the case on the basis of findings which are at odds with the admitted facts in the record—namely findings that there was a dispute as to the amount of demurrage, when the motion in the nature of a demurrer admitted that Arrow owed $4,433.66 and wilfully and arbitrarily repudiated the demurrage provisions of the contract (Pet. for Cert. 3, 4).

SUMMARY OF THE ARGUMENT.

The fallacy in the contention made here by Johnston is apparently caused by his misapprehension of three things:

(A) The Court of Appeals made no such findings; and its decision was not based upon any assumption of facts not in the record.

(B) There is no admission in the record that Arrow wilfully repudiated all demurrage liability under the contract. Johnston's assumption of such facts arises out of his failure to grasp that the motion testing the legal sufficiency of the answer admitted only the facts well pleaded and not his conclusions of law drawn from Arrow's breach of its alleged oral undertakings.

(C) The Court of Appeals had before it the stipulation that the amount of demurrage actually owing was only $2,990.62 and not the $4,433.66 claimed by Johnston and admitted to be owing by the motion testing the sufficiency of the Answer.

We will discuss these in order.

ARGUMENT.

A.

The Court of Appeals made no findings as asserted by Johnston, except to point out what the pleadings alleged, and the stipulation of the parties on the demurrage claim. Since the case was decided on the pleadings and the two stipulations, it was necessary for the Appeals Court to describe the pleadings and the proceedings on them. To this the first four pages of the opinion are devoted (R. 204, 207).

Out of this description Johnston isolates the digest of the allegations of the complaint (R. 8) describing the dispute on demurrage (R. 205):

> "In the course of oil deliveries from Vicksburg to Chicago, delays occurred in unloading barges by Arrow. Because of these delays, Johnston billed Arrow for a total demurrage of $4,433.66. Of this amount $386.33 was for deliveries made under the previous contract. The remainder was under the demurrage clauses of the contract of September 6. Arrow did not pay the demurrage thus claimed and billed by Johnston, because the former asserted that the delays in unloading had been caused by faulty barges furnished by Johnston, and for the further reason that the six hour hook-up time allowed by the contract was to be granted to each barge in a tow, rather than for the two as a whole, as asserted and claimed by Johnston."

and calls it a finding! His own contrary allegations of his answer are found in the opinion at page 206 of the record.

Again on page 212 Johnston cites:

> "However, the complaint does disclose the only

reason given by Johnston for failing to comply with his agreement, and that is the parties' disagreement as to the amount of demurrage due from Arrow which Johnston, up to the time of the judgment, had maintained was $4,433.66, and which upon the entry of the final judgment the parties stipulated to be $2,990.62."

The language is out of a paragraph which disposes, in part, of the error assigned on the disposition of the *motion to dismiss the complaint!* It is elementary that such a motion admits the facts well pleaded.

The first "finding" Johnston cites is simply the description of those allegations of the Complaint having to do with demurrage; he omits the contrary allegations of his own answer. The second "finding" is simply the statement of the Court setting forth the allegations of the complaint in the light of a motion against it admitting the facts well pleaded.

In disposing of the point on which Johnston bases his petition here, the Circuit Court of Appeals commences on page 214 of the record and concludes on page 215:

> "In the light of the decisions referred to, we think the demurrage clause in this contract was an independent covenant and that it did not go to the consideration for the whole contract. *Palmer* v. *Meriden Britannia Co., supra; Rubens* v. *Hill*, 213 Ill. 523; *Foreman Trust and Savings Bank* v. *Tauber, supra.* We are convinced that Arrow's default in the payment of demurrage did not justify Johnston in cancelling the contract."

There were no "findings". The Circuit Court of Appeals held simply that Arrow's failure to pay the demurrage did not justify Johnston's repudiation of the contract.

(B)

There is no admission in the record that Arrow wilfully and deliberately repudiated its obligation to pay demurrage under the contract. The basis for this assertion lies in Johnston's failure to realize that a demurrer, or motion in the nature of a demurrer, admits only the facts well pleaded.

The oral undertakings on the part of Arrow alleged by Johnston in his Answer to unload at 750 barrels an hour and to install equipment capable of doing so were properly stricken by the trial and Appeals Court. The correctness of such decisions is not questioned by Johnston here. He does not even mention these allegations nor the theory that prompted them.

His conclusions drawn upon them, that Arrow showed a deliberate intent to repudiate material undertakings, showing a wilful default going to the root of the contract likewise fall (R. 45, 46).

It is elementary that such a motion admits only the *facts* well pleaded; neither conclusions, nor facts inadmissible in evidence.

The only thing that stands admitted by Arrow's motion testing the sufficiency of the Answer is that Arrow categorically refused to pay any demurrage. Johnston claimed the amount due was $4,433.66. The motion admitted this.

But the assertions that Arrow "wilfully and arbitrarily" repudiated the demurrage provisions of the contract are pure conclusions on Johnston's part. Witness Arrow's wire of April 2, 1942 (Rec. 9) which stands admitted of record.

(C)

The Circuit Court of Appeals had before it the stipulation of the parties that the demurrage actually owing was only $2,990.62, and not the $4,433.66 claimed by Johnston and admitted by Arrow's motion.

True, in determining the legal sufficiency of the answer, Arrow's motion admitted that $4,433.66 was owing and that Arrow refused to pay this sum.

But when the case came on for trial, to dispose of the issue remaining under the counterclaim, the parties stipulated that Arrow owned only $2,990.62 and not the larger figure.

The appeal brought the whole record before the Court of Appeals, including the judgment appealed from. The stipulation was embodied in the judgment order (R. 180, 181).

Johnston feels that he is entitled to the credit for the demurrage in the amount stipulated, but that for the purpose of justifying his repudiation Arrow must be held to owe the larger figure.

We feel that the correct answer is that the ruling on the answer is to be tested in the light of the admission that $4,433.66 was owing; but that the validity of the judgment must be tested in the light of the figure determined by the stipulation.

If any inference is to be drawn from the stipulation entered into upon the entry of judgment, it is that Arrow did not owe the $4,433.66 claimed by Johnston when he repudiated the contract.

Conclusion.

As this case progressed, Johnston's maneuvers to stay in court grew increasingly desperate. At the pre-trial conference the Trial Court suggested a reply which would, in the alternative, test the sufficiency of the Answer and Counter Claim, and requested briefs on such motions. This was December 21, 1944 (R. 32). After Arrow had filed its motions and its briefs in support thereof (R. 33), Johnston obtained two extensions of time to file his brief and on the second extension, obtained leave to amend his answer (R. 40, 41). This was February 17, 1945, over two years after suit was filed. The Trial Court ruled adversely to Johnston on October 2, 1945 (R. 49, 50, 57, 78). When this happened, Johnston brought in his third defense—three years after suit was filed (R. 50, 59, 61, 62)! After the Trial Court had ruled adversely on the third defense, Johnston moved to amend it (R. 90, 91, 92-94, 87).

All through this litigation he has squirmed first one way and then the other, without reference to any position he had taken previously.

The contentions made in his Petition here are on a par with his previous conduct of the suit.

It is respectfully submitted that his Petition should be denied.

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of Bishop, Mitchell & Burdett,
Attorney for Arrow Petroleum Co., respondent.

ROBERT J. BURDETT,
Of Counsel.